



September 6, 2001

Ms. Janice Mullenix  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2001-3970

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151643.

The Texas Department of Transportation (the “department”) received a request for an electronic copy of the complete names, mailing addresses, and date requested, if possible, of individuals who requested the Texas Travel Guide or other Texas tourism information during the three-year period that ended May 1, 2001. You claim that the requested information is excepted from disclosure under sections 552.101, 552.110, and 552.137 of the Government Code. We have considered the exceptions you raise and have reviewed the representative sample of information you submitted.<sup>1</sup> We also received written comments from the requestor. See Gov’t Code § 552.304 (providing that interested person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception protects information that another statute makes confidential. You raise section 552.101 in conjunction with section 201.205 of the Transportation Code. Section 201.205 provides in relevant part:

(a) The department may

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the department to withhold any responsive information that is substantially different from the submitted information. See Gov’t Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).



(1) apply for, register, secure, hold, and protect under the laws of the United States, any state, or any nation a patent, copyright, trademark, or other evidence of protection or exclusivity issued in or for an idea, publication, or other original innovation fixed in a tangible medium, including:

- (A) a literary work;
- (B) a logo;
- (C) a service mark;
- (D) a study;
- (E) a map or planning document;
- (F) an engineering, architectural, or graphic design;
- (G) a manual;
- (H) automated systems software;
- (I) an audiovisual work;
- (J) a sound recording; or
- (K) travel literature, including a pamphlet, bulletin, book, map, periodical, or electronic information published or produced under Section 3, Chapter 193, Acts of the 56th Legislature, Regular Session, 1959 (Article 6144e, Vernon's Texas Civil Statutes)[.]

Transp. Code § 201.205(a). You assert that “the legislature recognized in Transportation Code, §201.205 that [the department] has a right to protect its intellectual property.” You do not demonstrate, however, and it does not otherwise appear to this office that section 201.205 makes the requested information confidential. Therefore, the information at issue is not excepted from disclosure under section 552.101 of the Government Code.

You also contend that the requested information constitutes a trade secret. Section 552.110(a) of the Government Code excepts from public disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be



any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958).<sup>2</sup>

As a general rule, section 552.110 protects the proprietary interests of private parties who submit information to governmental bodies. *See Open Records Decision No. 319 at 2 (1982) (construing statutory predecessor).*<sup>3</sup> You inform this office that the department, in cooperation with the Texas Department of Economic Development, compiles names, addresses, and other information relating to persons who request Texas travel information.

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<sup>2</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

<sup>3</sup>We note that Open Records Decision No. 593 (1991) and the other rulings on which you rely apply section 552.104 of the Government Code. This exception protects a governmental body's competitive interests in certain situations. *See ORD 593 at 4 (1991) (stating that where competition with private enterprise is authorized by law, governmental body may claim "competitive advantage" aspect of statutory predecessor).* The department does not raise section 552.104, however, and therefore we are unable to consider whether this exception is applicable in this instance. *See Open Records Decision No. 592 at 8 (1991) (stating that governmental body may waive section 552.104).*



You claim that this compilation of information constitutes a trade secret of the department. This office has previously determined that information obtained from third persons by a governmental body and compiled by the governmental body for its own purposes does not qualify as a trade secret under section 552.110. *See* Open Records Decision Nos. 590 at 4 (1991) (concluding that statutory predecessor to section 552.110 did not except from disclosure information generated and maintained by West Texas State University in connection with transactions with private donors), 568 at 3 (1990) (concluding that information relating to names and account balances of members of Cigarette Tax Recovery Trust Fund held by State Treasurer was not commercial or financial information "obtained from a person" for purposes of statutory predecessor to section 552.110). We therefore conclude that the requested information does not constitute a trade secret of the department and thus is not excepted from disclosure under section 552.110 of the Government Code.

You also claim that e-mail addresses obtained from the public are excepted from public disclosure. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.<sup>4</sup> Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). We note that this request for information does not appear to encompass any responsive e-mail addresses that the department holds. Moreover, the submitted representative sample of information does not contain e-mail addresses. Nevertheless, we agree that section 552.137 requires the department to withhold a responsive e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release.

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<sup>4</sup>House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.



In summary, the requested information is not excepted from disclosure under sections 552.101 or 552.110 of the Government Code. An e-mail address submitted to the department by a member of the public may be confidential under section 552.137. With that possible exception, the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

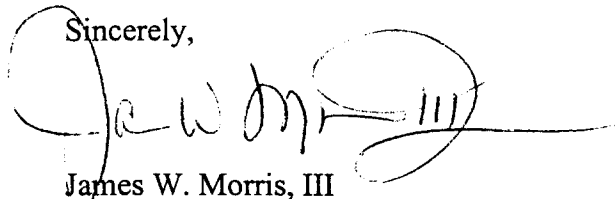
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.



If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 151643

Enc: Submitted documents

c: Mr. Sean F. Barbera  
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(w/o enclosures)